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CHARLES ELMORE

IN THE

# Supreme Court of the United States

NO. 444—OCTOBER TERM, 1931.

VERA ALEXANDER, Administratrix of the Estate of James Alexander, deceased, *et al.*,

*Petitioners,*

—against—

SPENCER KELLOGG & SONS, INC.,

*Respondent.*

## BRIEF IN OPPOSITION TO PETITION OF VERA ALEXANDER, ET AL., FOR A WRIT OF CERTIORARI.

BIGHAM, ENGLAR, JONES & HOUSTON,
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## *BRIEF IN OPPOSITION TO PETITION OF VERA ALEXANDER, ET AL., FOR A WRIT OF CERTIORARI.*

This respondent, Spencer Kellogg & Sons, Inc., has heretofore filed a petition for a writ of certiorari in this case. This respondent, however, opposes the present application on the ground that there is no merit in the case presented in the present petition.

The men who were killed or injured in the "Linseed King" disaster, fell into the three following groups:

(1) The regular employees of Spencer Kellogg & Sons, Inc., who had been employed for some time prior to the accident in that company's factory;

(2) The so-called "Saturday men", *i. e.*, the men who had applied for work at the company's factory in New

Jersey on Saturday, December 18, 1926, had been accepted, had been given numbered stubs of pay-roll cards, had been told to report for work on Sunday and had then been told to report at the dock, for transportation to the factory on the "Linseed King" on Monday, and who were killed or injured while being transported to the factory on the vessel on Monday, December 20, 1926;

(3) Applicants for work.

Both lower courts granted awards to the men (or the representatives of men) in class (3) *i. e.*, the applicants for work, and their cases are not here involved.

Both lower courts held, as a matter of law, that the men in class (2) *i. e.*, the "Saturday men", were not employees of Spencer Kellogg & Sons, Inc., at the time of the disaster and that they accordingly were not within the purview of the New Jersey Workmen's Compensation Statute. Spencer Kellogg & Sons, Inc. (respondent herein) has already applied to this Court for certiorari to review the decision below in so far as concerns questions of law relating to the Saturday men.

The present application for certiorari relates to the men in class (1), *i. e.*, the regular factory employees of the Company. The claims of these men were disallowed by both lower courts, on the ground that they were within the New Jersey Workmen's Compensation Act. Both lower courts concurred in finding, as a matter of fact, on undisputed testimony, that these men had entered into their contracts of employment with the respondent in New Jersey, that there was no agreement that the State Compensation Statute should not apply and that the implied contract that the Compensation Statute should apply had not been waived or abrogated.

The courts below accordingly held, as a matter of law, that the Compensation Statute of New Jersey was a bar to their claims in this proceeding.

The petition heretofore filed by Spencer Kellogg & Sons, Inc., for a writ of certiorari does not raise or discuss the issue as to the binding effect of the New Jersey Workmen's Compensation statute on the claims of the regular employees. We submit that that issue was correctly determined in the lower courts, and that the only issues in this case which justify the granting of a writ of certiorari are the issues raised in the petition heretofore filed by Spencer Kellogg & Sons, Inc.

We shall answer the brief in support of this petition point by point.

## *Argument.*

## POINT I.

It is quite true that this Court, in *Hartford Accident & Indemnity Company v. Southern Pacific Company*, 273 U. S. 207, held that a federal court, sitting in admiralty in a limitation proceeding, acquires the right to marshal all claims, whether of admiralty origin or not, and award decrees accordingly. In other words the court can adjudicate non-maritime claims in a limitation proceeding. This is clear. It is equally clear, however, that no court can, in the first instance, adjudicate a workmen's compensation claim, under a statute which (like that of New Jersey) requires weekly payments. This Court has specifically recognized that *any* court (whether in admiralty or in equity or at law) is inherently unable, as a matter of machinery, as well as of principle, to adjudi-

cate or handle a workmen's compensation claim in the first instance.

*Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, 218.

See also

*Warren* v. *Morse Dry Dock & Repair Co.*, 235 N. Y. 445.

There is no conflict between these cases and the *Hartford Accident Indemnity Co.* case, nor is there anything in the latter case which requires a court to attempt to do something which no court, because of inherent limitation, can do, namely to adjudicate and enforce workmen's compensation claims.

As will be shown under the next point, the courts below were clearly correct in holding that the sole right of the employees and their representatives was under the New Jersey Workmen's Compensation Statute. Once that conclusion was reached, the *Hartford Accident Indemnity Company* case ceased to have any application.

## POINT II.

Under Point II of their brief petitioners say that the New Jersey Compensation Statute is ineffective to oust the maritime law. We respectfully submit that this argument places the cart before the horse. The problem is—does admiralty, under the circumstances here involved, oust the Compensation Statute.

Admittedly the employees were within the State Compensation Statute, unless that Statute is rendered

inapplicable by the rule of *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205.

For the rule of the *Jensen* case to apply, two things are necessary; *first* the situs of the accident must be maritime.

> *Industrial Commission* v. *Nordenholt Co.*, 259 U. S. 263.

And *second* the work in which the employee is engaged at the time of the injury must also be maritime—it must have a direct relation to commerce or navigation.

> *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U. S. 469;
> *State Industrial Board of the State of New York* v. *Terry & Tench Co., Inc., et al.*, 273 U. S. 639;
> *Millers Underwriters* v. *Braud*, 270 U. S. 59;
> *Alaska Packers* v. *Industrial Accident Commission*, 276 U. S. 467.

In the present case the *situs* was maritime but the work or employment was not. The employees who were killed or injured (except Roberts, whose case is not involved herein) were all employees in the respondent's factory, located on shore, and they were proceeding to it when the "Linseed King" sank.

## POINT III.

In Point III of their brief petitioners argue that the respondent has waived and repudiated the right to "confine petitioners to the compensation remedy" and is estopped to deny petitioners the right to recover in admiralty.

The answers to this argument are too numerous to permit and too obvious to require, more than brief summarization.

Waiver and repudiation are matters of fact. The two lower courts have concurred in finding the facts in favor of respondent. Such concurrent findings, even if they were not patently correct, would not be disturbed by this Court.

Estoppel, equitable or legal, is based on a change or attempted change of position. From the date of the first paper filed in this proceeding by the respondent, throughout the entire litigation, and down to the present moment, the respondent, on every possible occasion, both before the District Court, the Commissioner and the Circuit Court of Appeals, has consistently and insistently urged and maintained that the sole right of the petitioners was under the New Jersey Compensation Act. This limitation proceeding was a purely defensive action—it was not instituted until suits for enormous amounts had been commenced in the state courts, many of them by the present petitioners, asking damages and not compensation. In its petition for limitation the present respondent admitted liability for compensation and restricted its prayer for exoneration to such cases as did not fall within compensation. At the opening of the

trial it offered to waive all technicalities and aid the petitioners in securing compensation. The then counsel for petitioners rejected the offer on the ground that the Compensation Statute was not applicable. The offer, of course, was not and could not have been accompanied by a payment into court pursuant to Southern District Admiralty Rule No. 23, since compensation is payable in instalments and not in a lump sum. The lower courts gave to the estoppel argument the short shrift which it deserved.

Even if it could be held as a matter of fact that the respondent repudiated and waived the contract to pay compensation, the petitioners who are representatives of decedents could have no right in admiralty to damages for death. There is no right in admiralty to damages for death except where such right is created by Statute. The only Statute creating such a right which could possibly be applicable here is the New York Death Statute. But the highest court of the State of New York (whose decision in this regard is binding on all Federal Courts) held in *Barnhart* v. *American Concrete Steel Co.*, 227 N. Y. 531, that a right under the New York Death Statute was *non-existent* where the decedent, *at the time of his death*, was within the New Jersey Compensation Act. Accordingly, when the employees on the "Linseed King" were killed, there was not merely no remedy but no *right* to damages under the death statute. Obviously no act of the respondent in "repudiating" the compensation contract could create a right which the highest court of the state has held was non-existent under a statute of the State. And unless a right to damages existed under the New York Death Statute, admiralty could award no damages for death.

The decision which it is here sought to review, in so far as concerns the factory employees (who alone are here involved) is clearly correct. The decision below, on the phase of the matter sought to be reviewed by the present petition, involves no novel or difficult or unsettled points of law, nor any conflict with the decisions of this Court or of any other Circuit Court of Appeals. All of the questions presented by this petition involve either questions of fact in regard to which concurrent findings have been had below, or points of law which are thoroughly settled and established. The present petition should be denied, and the case should be reviewed by this Court only in regard to the questions presented in the separate petition for certiorari filed by the respondent herein.

Respectfully submitted,

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